

## THE ROBERTS COURT, COMPELLED SPEECH, AND A CONSTITUTIONAL DEFENSE OF AUTOMATIC VOTER REGISTRATION

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**ABSTRACT**—In August 2019, then-Chairwoman of the U.S. Election Assistance Commission publicly argued that automatic voter registration (AVR) is a form of compelled political speech that violates the First Amendment. This Essay undergoes the worthwhile, and as of yet unperformed, task of evaluating a hypothetical First Amendment challenge to AVR. In considering the merits of such a challenge, this Essay examines how the Roberts Court’s recent First Amendment jurisprudence might complicate this analysis by undermining the traditional frameworks used to evaluate incidental First Amendment harms caused by otherwise permissible election regulations.

**AUTHOR**—J.D., Yale Law School ’20. I am grateful to Francesca Procaccini, Robert Post, and Floyd Abrams for their generous feedback. Special thanks to Samantha Greenky and the editors of the *Northwestern University Law Review* for their diligent work.

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## INTRODUCTION

In August 2019, the then-Chairwoman of the U.S. Election Assistance Commission, Christy McCormick,<sup>1</sup> gave a presentation to the National Conference of State Legislatures (NCSL) in which she argued that automatic voter registration (AVR) violates the First Amendment.<sup>2</sup> Though her speech garnered little media attention, her presentation made a novel claim that is particularly shocking coming from a top U.S. election official: she suggested that AVR is a form of mandatory political speech.<sup>3</sup> Because she believes that registering to vote is “the embodiment of political speech protected by the

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<sup>1</sup> President Barack Obama nominated Christy McCormick, a Republican, to the Election Assistance Commission (EAC) in 2014; she was subsequently elected Chairwoman in 2015. *Commissioner Christy McCormick*, U.S. ELECTION ASSISTANCE COMM’N, <https://www.eac.gov/about/commissioner-christy-mccormick/> [<https://perma.cc/568W-K7PR>]; *Meet the Members of Trump’s “Voter Fraud” Commission*, BRENNAN CTR. FOR JUST. (July 18, 2017), <https://www.brennancenter.org/our-work/research-reports/meet-members-trumps-voter-fraud-commission#McCormick> [<https://perma.cc/3KRN-5CKZ>]. She was elected to a second nonconsecutive term as Chairwoman in 2019. *McCormick Elected New EAC Chairwoman*, U.S. ELECTION ASSISTANCE COMM’N (Feb. 25, 2019), <https://www.eac.gov/news/2019/02/22/mccormick-elected-new-eac-chairwoman> [<https://perma.cc/TPR8-3BRM>]. Established by the Help America Vote Act of 2002, the EAC is a bipartisan commission tasked with “developing guidance to meet HAVA requirements, adopting voluntary voting system guidelines, and serving as a national clearinghouse of information on election administration.” *About the U.S. EAC*, U.S. ELECTION ASSISTANCE COMM’N, <https://www.eac.gov/about-the-useac/> [<https://perma.cc/97N8-R78V>].

<sup>2</sup> Christy McCormick, Comm’r, U.S. Election Assistance Comm’n, Presentation to the National Conference of State Legislatures, Motor Voter Registration: Modernization and Challenges (August 2019), [https://electionlawblog.org/wp-content/uploads/Presentation\\_Christy\\_McCormick.pdf](https://electionlawblog.org/wp-content/uploads/Presentation_Christy_McCormick.pdf) [<https://perma.cc/KH67-JGPR>] [hereinafter McCormick Presentation]; see Rick Hasen, *EAC Commissioner Christy McCormick Gives Presentation Arguing Against Automatic Voter Registration, Suggesting It Violates the 1st Amendment and Raises “Security Concerns” About People Registering to Vote*, ELECTION L. BLOG (Aug. 13, 2019, 10:38 AM), <https://electionlawblog.org/?p=106882> [<https://perma.cc/9SFS-L76F>].

<sup>3</sup> McCormick Presentation, *supra* note 2.

[First] Amendment,”<sup>4</sup> she concluded that automatically registering voters is compelled speech that violates the First Amendment right to “refrain from speaking at all.”<sup>5</sup>

Commissioner McCormick later deflected any public criticism, stating that she was “specifically asked by NCSL to provide a counterpoint and share some of the challenges to implementing automatic voter registration.”<sup>6</sup> However, other comments belie Commissioner McCormick’s attempt to pass the buck.<sup>7</sup> For example, Commissioner McCormick gave a similar presentation to the NCSL in 2015 that appeared to stop just short of answering “yes” to the self-posed question: “Does Automatic Voter Registration [v]iolate the Constitution?”<sup>8</sup> And, even more telling are Commissioner McCormick’s statements in her capacity as a member of President Trump’s voter-fraud commission. In a 2017 speech to the American Legislative Exchange Council (ALEC)—a powerful conservative group behind many of the controversial laws passed by Republican state legislatures<sup>9</sup>—she stated, “I do think there is a fundamental question: Does automatic voter registration violate the Constitution? Congress, or

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<sup>4</sup> *Id.* This statement is a change from a presentation she gave in 2015, in which she claimed that “[v]oting is inherently political speech,” which is a distinct issue from whether *registering to vote* is speech. Christy McCormick, Presentation to the National Conference of State Legislatures, Legal Implications of Automatic Voter Registration, (August 3, 2015), [http://www.ncsl.org/documents/summit/summit2015/onlineresources/Legal\\_Implications\\_of\\_Automatic\\_Voter\\_Registration.pdf](http://www.ncsl.org/documents/summit/summit2015/onlineresources/Legal_Implications_of_Automatic_Voter_Registration.pdf) [<https://perma.cc/UG5U-C96S>] [hereinafter 2015 Presentation].

<sup>5</sup> McCormick Presentation, *supra* note 2 (quoting *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448, 2463 (2018)). She further argues that an opt-out provision is insufficient to mitigate harms to First Amendment freedoms. *Id.* Though this claim is worth investigating, doing so is beyond the scope of this Essay.

<sup>6</sup> Bill Theobald, *Top U.S. Election Official Opposes Automatic Voter Registration*, FULCRUM (Aug. 14, 2019), <https://thefulcrum.us/automatic-voter-registration-2639823562> [<https://perma.cc/524P-A3H4>].

<sup>7</sup> In her same 2019 statement, Commissioner McCormick also reiterated her support for automated registration (for example, allowing individuals to register to vote while renewing their drivers’ licenses) over automatic voter registration, saying, “[v]oters should give prior consent to registering to vote for a variety of reasons, including, but not limited to, indicating political affiliation, choosing to register in a different state, or declining to register based on religious objection.” *Id.*

<sup>8</sup> 2015 Presentation, *supra* note 4. In her 2015 presentation, Commissioner McCormick laid out a strong conception of First Amendment negative speech rights, which she explains as “the right NOT to speak.” *Id.* She then argues for the application of strict scrutiny to AVR and asks several rhetorical questions: “Do [states’] reasons [for implementing AVR] constitute a compelling governmental interest?”; “Is automatic voter registration narrowly tailored to serve that interest?”; and, “Is [o]pt [o]ut [a]dequate?” *Id.* Her presentation strongly suggests that the answer to each of these questions is “no.” But rather than reaching the conclusion that AVR is, in fact, unconstitutional, she finishes with a call to “[p]roceed with [c]autious and [d]o [m]ore [r]esearch.” *Id.*

<sup>9</sup> See Nancy Scola, *Exposing ALEC: How Conservative-Backed State Laws Are All Connected*, ATLANTIC (Apr. 14, 2012), <https://www.theatlantic.com/politics/archive/2012/04/exposing-alec-how-conservative-backed-state-laws-are-all-connected/255869/> [<https://perma.cc/28SG-96EQ>].

government, should not be making any law abridging the freedom of speech . . . . The First Amendment includes the right not to speak as well as the right to speak.”<sup>10</sup>

Given the persistence of Commissioner McCormick’s position,<sup>11</sup> evaluating the imminent First Amendment challenge to AVR is a worthwhile task. In light of the Roberts Court’s recent compelled speech cases, it is also a challenge that should be taken seriously. A realistic—rather than idealistic—analysis suggests that the Roberts Court could consider a First Amendment attack on AVR far more seriously than the academy might. Nevertheless, such a challenge should fail.

Part I provides a definition of AVR and argues that automatically registering voters is fundamentally consistent with the animating principles of the First Amendment. In Part II, the Essay offers a constitutional defense of AVR. As a threshold matter, First Amendment jurisprudence should preclude treating the act of registering to vote as a form of political speech. If voter registration is not political speech, then it cannot be that AVR unconstitutionally compels the expression of a political idea. Finally, Part III warns that a compelled speech challenge to AVR may be taken more seriously by the Court than one might expect.

Though this Essay is first and foremost a constitutional defense of AVR, it should also serve as a First Amendment alarm bell. By highlighting developing threats to a policy that only two decades ago most would have regarded as beyond constitutional challenge, this Essay warns of the absurdity of extending emerging fissures in compelled speech doctrine to their logical ends.

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<sup>10</sup> Sam Levine, *3 Members of Trump Panel Warn of Voter Fraud to Influential Conservative Group*, HUFFPOST (Dec. 7, 2017, 8:05 PM), [https://www.huffpost.com/entry/trump-voter-fraud-commissioner-alec\\_n\\_5a29bfbde4b069ec48abff48](https://www.huffpost.com/entry/trump-voter-fraud-commissioner-alec_n_5a29bfbde4b069ec48abff48) [<https://perma.cc/84DW-XJ7F>].

<sup>11</sup> Commissioner McCormick is not alone in promoting her position. Numerous conservative commentators and policy groups have adopted similar positions. *See, e.g., Automatic Voter Registration*, VOTING INTEGRITY INST., <https://votingintegrityinstitute.org/issues/automatic-voter-registration/> [<https://perma.cc/4XSE-4QP6>] (calling the act of registration “undoubtedly an act of political speech”); *id.* (“Many citizens are, in fact, trying to make a political statement when they choose not to register because they are not interested in the election or the candidates, believe that their vote will not make a difference, or do not wish to participate in politics.”); Robert Knight, Opinion, *Countering the Lies of the Left*, WASH. TIMES (Sept. 18, 2016), <https://www.washingtontimes.com/news/2016/sep/18/mandatory-voter-registration-is-a-bad-idea/> [<https://perma.cc/2APF-FUEJ>] (“[AVR] violates a citizen’s basic free speech rights, such as expressing displeasure with the electoral process by not participating.”).

## I. AUTOMATIC VOTER REGISTRATION AND CORE FIRST AMENDMENT PRINCIPLES

Automatic voter registration is a relatively novel policy that seeks to simplify the way Americans register to vote.<sup>12</sup> AVR makes two significant changes to traditional voter registration systems: first, AVR makes registering to vote an “opt-out” rather than “opt-in” process; and second, most AVR plans require state agencies that register voters to electronically transfer registration information to election administrators, instead of using paper forms.<sup>13</sup> Unlike the traditional registration system, which requires individual citizens to affirmatively register, AVR shifts the burden of voter registration onto the state, which would bring our practices in line with those of most other major democracies.<sup>14</sup>

There are various forms of AVR, but for the purposes of this Essay, I assume the format of the “Oregon model.”<sup>15</sup> Under this model, an eligible voter who interacts with a relevant state agency (like the DMV) “is not asked whether they would like to register to vote, but instead is automatically opted into registering. The voter is later sent a notification informing them that they were registered and that they can opt-out by returning the notification.”<sup>16</sup>

AVR does more than simply serve the practical goal of lessening burdens on voters. As one policy group describes it, “AVR strengthens democracy by expanding and broadening the electorate.”<sup>17</sup> A commitment to

<sup>12</sup> *Automatic Voter Registration, a Summary*, BRENNAN CTR. FOR JUST. (July 10, 2019), <https://www.brennancenter.org/our-work/research-reports/automatic-voter-registration-summary> [https://perma.cc/TT74-SV2W]. To date, seventeen states and Washington, D.C. have implemented or passed some form of AVR. *History of AVR & Implementation Dates*, BRENNAN CTR. FOR JUST. (July 29, 2020), <https://www.brennancenter.org/our-work/research-reports/history-avr-implementation-dates> [https://perma.cc/N5YD-YRVP].

<sup>13</sup> *Automatic Voter Registration*, *supra* note 12.

<sup>14</sup> See Wendy R. Weiser, *Automatic Voter Registration Boosts Political Participation*, BRENNAN CTR. FOR JUST. (Jan. 29, 2016), <https://www.brennancenter.org/blog/automatic-voter-registration-boosts-political-participation> [https://perma.cc/PAD4-KEFK]. In fact, many industrialized democracies employ something more radical, called universal voter registration, which requires the government to make even more of an affirmative effort to register citizens, rather than AVR’s subtle burden shift that simply allows eligible voters to register when citizens interact with government agencies for other reasons. See Christopher W. Carmichael, *Proposals for Reforming the American Electoral System After the 2000 Presidential Election: Universal Voter Registration, Mandatory Voting, and Negative Balloting*, 23 HAMLINE J. PUB. L. & POL’Y 255, 302–03 (2002).

<sup>15</sup> Oregon became the first state to implement AVR in January 2016. *Automatic Voter Registration*, NAT’L CONF. ST. LEGISLATURES (Apr. 14, 2020), <http://www.ncsl.org/research/elections-and-campaigns/automatic-voter-registration.aspx> [https://perma.cc/SYWA-H7GC].

<sup>16</sup> *Id.*

<sup>17</sup> Rob Griffin, Paul Gronke, Tova Wang & Liz Kennedy, *Who Votes with Automatic Voter Registration?*, CTR. AMER. PROGRESS (June 7, 2017, 8:56 AM), <https://www.americanprogress.org/issues/democracy/reports/2017/06/07/433677/votes-automatic-voter-registration/> [https://perma.cc/BE7P-LEXM].

increased civic engagement is at the heart of AVR policy; that is, any citizen who is eligible to participate in our democracy should be able to do so. In the current political landscape, expanding access to the franchise tends to benefit one party more than the other,<sup>18</sup> but regardless of AVR's electoral impacts, the policy undeniably serves to broaden the pool of voters. These democratic values motivated the implementation of AVR in Oregon, where advocates described a desire to develop "a more efficient way to increase civic engagement among eligible Oregonians."<sup>19</sup> AVR promises to "cure the ills in our democracy with more democracy" as it "remov[es] outdated and unnecessary barriers to voter engagement."<sup>20</sup>

By implementing a system that seeks to remove franchise barriers, policy makers inherently advance particular moral ideals, such as increasing political involvement and enhancing democratic discourse. These values are fundamentally consistent with one of the commonly recognized animating purposes of the First Amendment.<sup>21</sup> Indeed, nearly a century ago, Justice Brandeis envisioned a First Amendment driven by an underlying value of political discourse:

Those who won our independence believed that . . . in . . . government the deliberative forces should prevail over the arbitrary. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.<sup>22</sup>

Justice Brandeis identifies speech and assembly as "functions essential to effective democracy," and he focuses on the republican duty to participate as he roots the First Amendment in the value of deliberative democracy.<sup>23</sup> Over the last century, First Amendment jurisprudence has largely developed

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<sup>18</sup> See, e.g., Philip Ewing, *Voting and Elections Divide Republicans and Democrats Like Little Else. Here's Why*, NPR (June 12, 2020, 5:03 AM), <https://www.npr.org/2020/06/12/873878423/voting-and-elections-divide-republicans-and-democrats-like-little-else-heres-why> [<https://perma.cc/S2QR-B32K>].

<sup>19</sup> Griffin et al., *supra* note 17.

<sup>20</sup> Pratt Wiley, *Massachusetts Expands Voter Access*, 63 BOSTON BAR J. 11, 13 (2019).

<sup>21</sup> In addition to democratic self-governance, other offered First Amendment values include the marketplace of ideas and expressive autonomy rationale. See Erica Goldberg, *Competing Free Speech Values in an Age of Protest*, 39 CARDOZO L. REV. 2163, 2164 n.1 (2018); R. George Wright, *Why Free Speech Cases Are as Hard (and as Easy) as They Are*, 68 TENN. L. REV. 335, 337–41 (2001).

<sup>22</sup> *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). Justice Brandeis's construction of the First Amendment was effectively endorsed by the Court in *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

<sup>23</sup> *Whitney*, 274 U.S. at 377.

with reference to these underlying democratic values. From libel to patronage and much in between, First Amendment jurisprudence is guided by a commitment to “free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means.”<sup>24</sup>

Thus, AVR—which lessens the burdens of participating in democracy and broadens the electorate—enhances the responsiveness of the deliberative democracy at the heart of the First Amendment, making it more likely the government is responsive to the will of the *whole* people.

## II. A CONSTITUTIONAL DEFENSE OF AVR

First Amendment doctrine broadly supports the constitutionality of AVR. In this Part, I first discuss whether voter registration should be considered expression of a political idea, such that AVR amounts to unconstitutionally compelled speech. Then, I briefly address what level of scrutiny might apply to an AVR challenge.

### *A. Should AVR Be Considered Compelled Political Speech?*

The Supreme Court has very clearly enunciated “the principle that freedom of speech prohibits the government from telling people what they must say.”<sup>25</sup> Under this principle, the Court has struck down numerous instances of compelled speech, including a law requiring schoolchildren to recite the Pledge of Allegiance and salute the flag<sup>26</sup> and a law requiring New Hampshire drivers to display the state motto—“Live Free or Die”—on their license plates.<sup>27</sup> However, not all compelled speech is necessarily unconstitutional. The government is regularly permitted to compel the disclosure of factual information—for example, through financial disclosure forms<sup>28</sup>—without warranting First Amendment protection. The question here

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<sup>24</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964); *see, e.g., Elrod v. Burns*, 427 U.S. 347, 357 (1976) (quoting *Ill. State Emps. Union v. Lewis*, 473 F.2d 561, 576 (1972)) (“Patronage . . . is ‘at war with the deeper traditions of democracy embodied in the First Amendment.’”).

<sup>25</sup> *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 61 (2006).

<sup>26</sup> *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943).

<sup>27</sup> *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

<sup>28</sup> *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988) (“[A]s a general rule, the State may itself publish the detailed financial disclosure forms it requires professional fundraisers to file . . . [a] procedure [that] would communicate the desired information to the public without burdening a speaker with unwanted speech during the course of a solicitation.”).

is whether registering to vote is the *kind of speech* that, when compelled, triggers First Amendment protection.<sup>29</sup>

We must determine, then, if AVR is the compelled expression of an opinion or belief, or if it merely compels disclosure of information. The question of whether voter registration is properly understood as expressive conduct<sup>30</sup> for First Amendment purposes has received little, if any, scholarly<sup>31</sup> or judicial<sup>32</sup> attention. Critics of AVR explain that some citizens choose *not* to register as a means of “expressing displeasure with the electoral process,”<sup>33</sup> but this is beside the point. To understand whether AVR compels speech, the relevant question is whether compelling the affirmative

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<sup>29</sup> Though it is technically possible that AVR’s opt-out options could still save it from unconstitutionality even if the law *does* compel speech, a comprehensive discussion of opt-out provisions is beyond the scope of this Essay. This piece argues that AVR does not unconstitutionally compel speech, which dispels the need to evaluate whether opt-out provisions would make the policy constitutional.

<sup>30</sup> As a general matter, AVR regulates conduct, not speech because “[i]t affects what [individuals] must do”—register to vote—not what they may or may not say.” *Rumsfeld*, 547 U.S. at 60 (emphasis omitted).

<sup>31</sup> One recent article makes a conclusory statement in its opening sentence regarding the expressive value of registering to vote but provides no specific justification for its claim—rather the authors extensively discuss voting *itself* and registering *others to vote* as a form of speech. See Armand Derfner & J. Gerald Hebert, *Voting Is Speech*, 34 YALE L. & POL’Y REV. 471, 471 (2016) (“It seems like an obvious proposition that a citizen registering to vote or casting a ballot is engaging in free speech, a fundamental right entitled to full protection under the First Amendment to the United States Constitution.”); see also John R. Kramer, *Comment on Rebecca Eisenberg’s “The Scholar as Advocate,”* 43 J. LEGAL EDUC. 401, 402–03 (1993) (offering no explanation for a passing reference to First Amendment problems inherent in requiring voter registration as a condition for receiving benefits).

<sup>32</sup> At least one state supreme court has considered a similar question, but it did so in the context of a state constitutional qualification for serving as a state representative. See *Peters v. Johns*, 489 S.W.3d 262 (Mo. 2016) (en banc). In relevant part, the Missouri Supreme Court determined that a candidate’s intentional failure to register to vote “for the purpose of political protest” did not invoke First Amendment protection. *Id.* at 269–71. The Missouri Supreme Court’s analysis largely agrees with the argument of this Essay. See *id.* at 271 (holding that “Johns’ failure to register to vote does not invoke First Amendment protection” because the conduct—or lack thereof—is not “inherently expressive”).

Numerous lower courts have addressed the entirely separate question of whether the act of registering others to vote is expressive conduct. As one court described it, voter registration drives are inextricably imbued with core speech because they include efforts to “persuade others to vote, educate potential voters about upcoming political issues, communicate their political support for particular issues, and otherwise enlist like-minded citizens in promoting shared political, economic, and social positions.” *League of Women Voters of Fla. v. Cobb*, 447 F. Supp. 2d 1314, 1333 (S.D. Fla. 2006). For additional cases discussing voter registration drives, see the cases cited in David Feinstein, Note, *A New Approach to Judicial Scrutiny of Voter Registration Laws*, 2014 CARDOZO L. REV. DE NOVO 69.

<sup>33</sup> Knight, *supra* note 11. It is not clear from her presentation whether Commissioner McCormick agrees with this notion that registering to vote—and participating in elections more broadly—signals acceptance of the electoral process. Commissioner McCormick does offer a few reasons that someone might not want to register, which may provide insight. Some are purely functional, like not wanting to be called for jury duty, or wanting to register in another state. Others could arguably implicate protected speech, like objections due to “[r]eligious affiliation,” refusing to register because “[n]o candidate or issue . . . inspires them enough to register and vote,” or abstaining because you “simply object to it.” McCormick Presentation, *supra* note 2.



act of registering to vote violates the First Amendment.<sup>34</sup> In other words, is the government forcing political expression by automatically registering you? Recognizing this distinction, Commissioner McCormick argues that *actively* registering to vote is “the embodiment of political speech protected by the [First] Amendment”—that is, for some, registering to vote expresses support for the electoral process.<sup>35</sup>

Contrary to Commissioner McCormick’s argument, however, First Amendment jurisprudence suggests that voter registration is not politically expressive. In *United States v. O’Brien*, the Court recognized that some forms of “symbolic speech” were deserving of First Amendment protection, but it rejected the view that “conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”<sup>36</sup> Instead, the Court extends First Amendment coverage to conduct that is “inherently expressive.”<sup>37</sup> Even though it is possible for someone to register to vote with the intent to convey a particular message of support for the electoral process, that action does not become inherently political conduct merely because the actor intends to express an idea. *Spence v. Washington*’s test for coverage of nonverbal activity confirms this reading: even if a registrant intends “to convey a particularized message” that they support the electoral process, their nonverbal activity does not warrant coverage under the First Amendment unless the “likelihood was great that the message would be understood by those who viewed” the act of registering.<sup>38</sup>

The Roberts Court’s analysis in *Rumsfeld v. Forum for Academic & Institutional Rights* offers further insight into why AVR might not unconstitutionally compel speech. In *Rumsfeld*, law schools brought a compelled speech challenge against the Solomon Amendment, which required the Department of Defense to deny federal funding to higher education institutions that did not allow military recruiting on campus.<sup>39</sup> Prior to the Solomon Amendment, law schools expressed their disagreement with the military by treating military recruiters differently, “[b]ut these

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<sup>34</sup> *Cf. Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (refusing to allow the State of New Hampshire to require individuals to display the state motto on license plates, not because *covering* the motto was expressive, but because the motto itself was an “ideological message” and law forced the individual “to be an instrument for fostering public adherence to [that] ideological point of view”).

<sup>35</sup> McCormick Presentation, *supra* note 2. This statement is a change from her 2015 presentation, in which she claimed that “[v]oting is inherently political speech,” which is a distinct issue from whether registering to vote is inherently speech. See 2015 Presentation, *supra* note 4.

<sup>36</sup> 391 U.S. 367, 376 (1968).

<sup>37</sup> *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 66 (2006).

<sup>38</sup> 418 U.S. 405, 410–11 (1974).

<sup>39</sup> *Rumsfeld*, 547 U.S. at 51. The Court considered both whether the Solomon Amendment compelled speech and whether the law compelled expressive conduct. The Court found that, as a general matter, the Amendment regulated conduct, not speech. *Id.* at 69–70.

actions were expressive only because the law schools accompanied their conduct with speech explaining it.”<sup>40</sup> Thus, the expressive component was “not created by the conduct itself but by the speech that accompanies it”— “[t]he fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection.”<sup>41</sup>

Registering to vote seems to similarly lack inherent expressive value.<sup>42</sup> Though a democracy advocate could explain that their registration signifies faith in the electoral process, absent that additional speech, it is unlikely “that the message would be understood by those who viewed it.”<sup>43</sup> And even *with* that accompanying explanatory speech, registering to vote does not implicate the First Amendment. The *Rumsfeld* Court made this exact point in an analogous situation: compulsory income taxes. The Court clarified that “if an individual announces that he intends to express his disapproval of the Internal Revenue Service by refusing to pay his income taxes”—which is exactly the kind of disapproval allegedly expressed by refusing to register to vote— “[n]either *O’Brien* nor its progeny supports” a result determining that “the Tax Code violates the First Amendment.”<sup>44</sup> Logic suggests that precedent similarly would not support striking down AVR as a First Amendment violation. That is, if the same disaffected individual announces his intent to express disapproval of the *electoral system* by refusing to *register to vote*, First Amendment precedent does not support a result determining that *AVR* unconstitutionally compels speech.

Further evidence that AVR is not compelled political speech comes from the Supreme Court’s unconstitutional condition cases. In *Alliance for Open Society International*, the Roberts Court maintained that the government cannot condition the receipt of a benefit—much less the exercise of a constitutional right—on the affirmation of a belief.<sup>45</sup> If voter registration was expressive conduct espousing a particular view, then the traditional

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<sup>40</sup> *Id.* at 66. Specifically, law schools would require military recruiters to interview on the undergraduate campus, while allowing other recruiters to conduct interviews on the law school campus. *Id.* at 53.

<sup>41</sup> *Id.* at 66.

<sup>42</sup> Of course, the act of registering expresses *something*, namely registration; it also expresses one’s address and name. But, much like the Court’s example of tax filings—which express plentiful information about your personal finances—the speech inherent in registering to vote nevertheless does not trigger First Amendment coverage.

<sup>43</sup> *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (citing *Spence v. Washington*, 418 U.S. 405, 410–11 (1974)).

<sup>44</sup> *Rumsfeld*, 547 U.S. at 66.

<sup>45</sup> *See Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 221 (2013) (finding that a requirement that “compels as a condition of federal funding the affirmation of a belief that by its nature cannot be confined within the scope of the Government program . . . violates the First Amendment”).

registration system—in which you have to register (i.e., affirm a belief) in order to vote (i.e., exercise a constitutional right)—would be an unconstitutional condition.<sup>46</sup> Even Commissioner McCormick does not believe that all voter registration is unconstitutional; for example, she openly supports *automated* (rather than *automatic*) registration, which allows individuals to register to vote when interacting with a state agency, such as renewing a drivers' license.<sup>47</sup> Yet striking down *any* voter registration requirement as an unconstitutional condition would be the logical consequence of treating registration as the affirmation of a belief. And her argument that AVR is compelled speech necessarily assumes that registering to vote expresses such a belief.

Therefore, longstanding precedent provides a strong constitutional defense of AVR. Registering to vote should not be understood as expressive for First Amendment purposes, and AVR should not be considered unconstitutional compelled speech.

### B. A Note on Scrutiny

The level of scrutiny that applies to AVR depends on how one characterizes both the nature of the speech and the severity of the burden. Commissioner McCormick suggested in her remarks that strict scrutiny must apply in evaluating AVR, relying on cases addressing both the right to vote and freedom of speech.<sup>48</sup> But even if the Court were to find that registering to vote implicates the First Amendment, precedent involving voting regulations that indirectly burden other rights counsels against treating AVR as a speech restriction that warrants strict scrutiny.

Commissioner McCormick argues—unpersuasively—that registering to vote is core political speech.<sup>49</sup> Even if this were true, strict scrutiny is not a given. “Exacting scrutiny”—which is arguably different from strict

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<sup>46</sup> See generally *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (describing the fundamental right to vote); see also *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (referring to “the political franchise of voting” as a “fundamental political right”); *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) (“Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”).

<sup>47</sup> Theobald, *supra* note 6.

<sup>48</sup> See 2015 Presentation, *supra* note 4 (first quoting *Reynolds*, 377 U.S. at 561–62; then quoting *Ohio Bell Tel. Co. v. Pub. Utils. Comm’n*, 301 U.S. 292, 307 (1937); and then quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Generally, government regulations that directly burden political speech receive strict scrutiny, meaning that the government must show that the law is narrowly tailored to achieve a compelling government interest.

<sup>49</sup> See McCormick Presentation, *supra* note 2.

scrutiny<sup>50</sup>—applies when an election regulation *directly* burdens core political speech.<sup>51</sup> But not even Commissioner McCormick would argue that AVR directly targets speech; rather, any burden on speech is incidental.

Instead, the Supreme Court applies a flexible standard, known as the *Anderson-Burdick* framework, to evaluate voting regulations that indirectly infringe on First and Fourteenth Amendment rights.<sup>52</sup> Under this framework, courts must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.”<sup>53</sup>

If an election regulation imposes “severe” burdens on First or Fourteenth Amendment rights, it must be “narrowly drawn to advance a state interest of compelling importance.”<sup>54</sup> However, when a state’s election law “imposes only ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of voters,” rational basis review applies, under which a state’s “‘important regulatory interests are generally sufficient to justify’ the restrictions.”<sup>55</sup>

*Burdick* involved, in part, a First Amendment challenge to Hawaii’s prohibition on write-in votes.<sup>56</sup> The Court recognized the speech inherent in voting,<sup>57</sup> but it explicitly rejected the presumption that laws burdening the right to vote “must be subject to strict scrutiny,”<sup>58</sup> despite the fact that strict scrutiny is usually applied to restrictions on core political speech.<sup>59</sup> The *Burdick* Court realized that “[e]lection laws will invariably impose some burden upon individual voters”—whether on their right to vote or their

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<sup>50</sup> Depending on the context, the Court is not always clear on whether “exacting scrutiny” is equivalent to strict scrutiny or less severe. Compare *Doe v. Reed*, 561 U.S. 186, 232 (2010) (Thomas, J., dissenting) (suggesting that “strict scrutiny” should apply instead of the lesser “exacting scrutiny”), with *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 346 n.10 (1995) (equating “exacting scrutiny” with “strict scrutiny”).

<sup>51</sup> See *McIntyre*, 514 U.S. at 345–46.

<sup>52</sup> See *Burdick v. Takushi*, 504 U.S. 428 (1992) (applying *Anderson v. Celebrezze*, 460 U.S. 780 (1983)).

<sup>53</sup> *Id.* at 434 (quoting *Anderson*, 460 U.S. at 789).

<sup>54</sup> *Id.* (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). This heightened standard of review for severe restrictions resembles traditional strict scrutiny.

<sup>55</sup> *Id.* (internal citations omitted).

<sup>56</sup> *Id.*

<sup>57</sup> See *id.* at 438 (noting that voters “express their views in the voting booth”).

<sup>58</sup> *Id.* at 432.

<sup>59</sup> See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (“Laws that burden political speech are ‘subject to strict scrutiny.’”) (quoting *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007)).

freedoms of speech and association—but “subject[ing] every voting regulation to strict scrutiny . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.”<sup>60</sup>

Rather, the Court employed the now-dominant balancing test under which “the rigorousness of [the constitutional] inquiry . . . depends upon the extent to which a challenged regulation burdens First . . . Amendment rights.”<sup>61</sup> The Court relied on a history of “repeatedly uph[olding] reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls” in finding that the state law prohibiting write-in votes was constitutional.<sup>62</sup> The tenuous nature of claiming that affirmatively registering to vote is speech, combined with the small number of people whose rights are potentially burdened and AVR’s opt-out option,<sup>63</sup> suggests that AVR imposes a relatively low burden on First Amendment rights and likely warrants lesser scrutiny under *Anderson-Burdick*—that is, if it warrants scrutiny at all.

It is worth addressing the counterargument that the *Anderson-Burdick* standard could be inapposite: *Burdick* involved a restriction on the First Amendment right to associate, not the right of free speech.<sup>64</sup> However, this should not carry much weight, in part because the Court recognized the presence of speech elements at play in *Burdick*; the Court was not convinced to apply strict scrutiny even though voters “express their views in the voting booth.”<sup>65</sup> Further, in other contexts, like petition circulation—which is “core political speech,” where “First Amendment protection” is usually “at its zenith”—the Court has nevertheless offered the caveat that “there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”<sup>66</sup>

Though it is true that a *direct* regulation of core political speech—like a ban on anonymous campaign literature—always warrants “exacting scrutiny,” the *Anderson-Burdick* framework generally governs when a regulation seeks to “control the mechanics of the electoral process.”<sup>67</sup> AVR

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<sup>60</sup> *Burdick*, 504 U.S. at 433.

<sup>61</sup> *Id.* at 434.

<sup>62</sup> *Id.* at 438.

<sup>63</sup> However, AVR’s opt-out reasoning alone may not suffice to justify lesser scrutiny, as the government cannot “require speakers to affirm in one breath that which they deny in the next.” *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 16 (1986).

<sup>64</sup> It is also worth noting that, in dicta, the *Burdick* Court described a “[r]easonable regulation of elections” as one that “*does not* require voters to espouse positions that they do not support.” *Burdick*, 504 U.S. at 438. In theory, if AVR is compelled speech, it necessarily requires such espousal.

<sup>65</sup> *Id.*

<sup>66</sup> *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 186–87 (1999) (internal citations omitted).

<sup>67</sup> *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 345, 347 (1995).

seeks to regulate election mechanics, not to intentionally and directly burden core political speech.

### III. DEFENDING AVR AGAINST THE ROBERTS COURT'S SHIFTING COMPELLED SPEECH DOCTRINE

The Roberts Court has passed down several decisions crucial to the above analysis, including the compelled speech ruling in *Rumsfeld*<sup>68</sup> and the unconstitutional conditions analysis in *Alliance for Open Society International*.<sup>69</sup> Notwithstanding the clarity with which those cases would dispose of a compelled speech challenge to AVR, three other recent cases suggest a troubling shift toward expanding the set of actions that constitute expressive conduct, broadening the definition of compelled speech, and extending the application of strict scrutiny to new classes of cases.

This Part defends AVR against developing trends in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,<sup>70</sup> *Janus v. AFSCME*,<sup>71</sup> and *NIFLA v. Becerra*.<sup>72</sup> Each of these cases has already received thorough academic treatment. This Essay does not intend to offer novel critiques of the content of these opinions—such an undertaking would require significantly more space than this piece has to offer. Rather, I suggest that improper expansion of trends in these cases would lead to outcomes that are entirely foreign to the First Amendment as we know it. Overextending the logic of these cases could lead to the troubling result of striking down AVR as compelled speech; that conclusion serves as a warning about absurdities lurking within the Roberts Court's recent First Amendment opinions.

#### A. *Masterpiece Cakeshop and the Expansion of Expressive Conduct*

A small faction of the Court seems to be relaxing its views on what constitutes covered conduct to include acts that are not inherently expressive. This view must not prevail, lest—contrary to the analysis in Part II—a whole slew of activities, from tax filing to voter registration, might be erroneously considered expressive conduct. As explained above, AVR does not unconstitutionally compel speech so long as the act of registering itself is not politically expressive conduct.<sup>73</sup>

*Masterpiece Cakeshop v. Colorado Civil Rights Commission*, a 2018 case, involved a baker's claim that a state law requiring that he make a

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<sup>68</sup> *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47 (2006).

<sup>69</sup> *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013).

<sup>70</sup> 138 S. Ct. 1719 (2018).

<sup>71</sup> 138 S. Ct. 2448 (2018).

<sup>72</sup> 138 S. Ct. 2361 (2018).

<sup>73</sup> See *supra* Part II.A.

wedding cake for a same-sex couple “violate[d] his First Amendment right to free speech by compelling him to . . . express a message with which he disagreed.”<sup>74</sup> The Court issued a narrow ruling on free exercise of religion grounds;<sup>75</sup> however, the free speech claim was addressed by Justice Thomas in a concurrence joined by Justice Gorsuch.

Justice Thomas argued that the baker, Jack Phillips, was engaged in expressive conduct because “Phillips considers himself an artist.”<sup>76</sup> He continued by noting that Phillips “sees the inherent symbolism in wedding cakes”—specifically explaining that “[t]o [Phillips], a wedding cake inherently communicates that ‘a wedding has occurred, a marriage has begun, and the couple should be celebrated.’”<sup>77</sup> Yet, this argument should be irrelevant to the First Amendment analysis; conduct cannot be labelled expressive simply because “the person engaging in the conduct intends thereby to express an idea.”<sup>78</sup> It is oxymoronic to say that a cake *inherently* expresses a particular message *to Phillips specifically*; if a message is inherent, it is a permanent attribute or essential element of something, such that anyone and everyone would understand it.<sup>79</sup>

Recognizing the limitation of his argument, Justice Thomas tried to argue that, more broadly, “[w]edding cakes do, in fact, communicate this message.”<sup>80</sup> To support this claim, Justice Thomas relies on an obscure dessert history book<sup>81</sup> for a statement that “[w]edding cakes are so packed with symbolism that it is hard to know where to begin.”<sup>82</sup> Justice Thomas suggests that “a wedding cake needs no particular design or written words to communicate the basic message that a wedding is occurring, a marriage has begun, and the couple should be celebrated.”<sup>83</sup> The problem is that the first two “messages” are not expressive for First Amendment purposes; they are just contextual facts. The only possible unconstitutionally compelled

<sup>74</sup> 138 S. Ct. at 1726.

<sup>75</sup> *Id.* at 1729–31.

<sup>76</sup> *Id.* at 1742 (Thomas, J., concurring in part).

<sup>77</sup> *Id.* at 1743 (quotation marks omitted).

<sup>78</sup> *United States v. O’Brien*, 391 U.S. 367, 376 (1968).

<sup>79</sup> See *Inherent*, VII OXFORD ENGLISH DICTIONARY 969 (2d ed. 1989) (“Existing in something as a permanent attribute or quality; forming an element, esp. a characteristic or essential element of something; belonging to the intrinsic nature of that which is spoken of; indwelling, intrinsic, essential.”).

<sup>80</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1743 (Thomas, J., concurring in part).

<sup>81</sup> It is not clear why this book should offer convincing support, as it is not even a best-seller within its own narrow category. See *Sweet Invention: A History of Dessert*, AMAZON.COM, <https://www.amazon.com/Sweet-Invention-History-Michael-Kronld/dp/161373655X> [<https://perma.cc/Q4JJ-ZN7T>] (ranking below 3000th among “gastronomy history” books).

<sup>82</sup> *Masterpiece Cakeshop*, 138 S. Ct. at 1743 (Thomas, J., concurring in part) (quoting MICHAEL KRONDL, *SWEET INVENTION: A HISTORY OF DESSERT* 321 (2011)).

<sup>83</sup> *Id.* at 1743 n.2 (Thomas, J., concurring in part).

expression is the idea that “the couple should be celebrated,” but Justice Thomas offers no specific support for the inherence of that message in the act of baking a cake.<sup>84</sup> And if wedding cakes, as a medium, *do* express these messages, it does not necessarily follow that this is the *kind* of speech that warrants First Amendment coverage.<sup>85</sup> In effect, Justices Thomas and Gorsuch are signing onto the view that whether conduct is expressive should turn, at least in some cases, on whether the actor intends for it to be.<sup>86</sup>

There is a clear problem with broadening the definition of expressive conduct in this manner. A First Amendment jurisprudence that links protection to intent becomes immediately untenable; it opens the door to claims that any kind of public accommodation is compelled speech if the actor believes there is expressive value in his work. As Professor Erwin Chemerinsky described it, “[i]f baking a cake is speech, then so is cooking food or, as in other cases that have arisen, taking pictures or making floral arrangements. Any business could refuse to serve gay weddings—or for that matter anyone—by claiming that the antidiscrimination law constitutes impermissible compelled speech.”<sup>87</sup> Concerningly, Justices Thomas and Gorsuch may not be alone in this view. Professor Chemerinsky warns that “[a]t the oral argument in *Masterpiece Cakeshop*, Chief Justice Roberts and Justice[] Alito . . . asked questions and made comments that left no doubt as to how they would vote” on the First Amendment issue.<sup>88</sup>

AVR provides a strong example not to follow the trail of breadcrumbs laid by Justice Thomas and Justice Gorsuch: relaxing the inherence requirement for evaluating expressive conduct would unravel a key argument against characterizing voter registration as expressive conduct.<sup>89</sup>

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<sup>84</sup> Some might agree that wedding cakes do inherently express “celebration,” but that the message belongs to the customers, not the baker. See, e.g., Labdhi Sheth & Molly Christ, Comment, *Let Them Eat Cake: Why Public Proprietors of Wedding Goods and Services Must Equally Serve All People*, 52 LOYOLA L.A. L. REV. 211, 232 (2018) (“The customer chooses the type of cake, the occasion, the color of the frosting, and the words on the cake. Thus, the customer’s First Amendment rights are at issue.”). However, that issue is beside the point for this Essay; what matters is that Justice Thomas, first and foremost, relies on *subjective, individual* interpretations of expression as the metric for identifying expressive conduct.

<sup>85</sup> For example, my tax filings express the message that “I am paying my taxes,” but that does not mean taxes violate the First Amendment. Similarly, no coverage is warranted just because a wedding case expresses that “a wedding is occurring.”

<sup>86</sup> See *supra* notes 34–36 and accompanying text.

<sup>87</sup> Erwin Chemerinsky, *Not a Masterpiece: The Supreme Court’s Decision in Masterpiece Cakeshop v. Colorado Civil Rights Commission*, ABA, [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/the-ongoing-challenge-to-define-free-speech/not-a-masterpiece/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/not-a-masterpiece/) [<https://perma.cc/RA59-72DX>].

<sup>88</sup> *Id.*

<sup>89</sup> See *supra* text accompanying notes 32–38 (arguing that the expression inherent in registering to vote is not the kind of speech that implicates the First Amendment).



Part II explained why Supreme Court precedent does not support the determination that AVR violates the First Amendment,<sup>90</sup> but relying on Justice Thomas's logic would open the door to compelled speech challenges to AVR. Doing so would be deeply problematic; whatever expression may be inherent in registering to vote, it is not the kind of speech that qualifies for First Amendment coverage.

### B. *Janus and the Expanding Definition of Compelled Speech*

The Court has also showed signs of extending its traditional compelled speech analysis into areas that were previously given separate treatment. In another 2018 case, *Janus v. AFSCME*, the Court essentially gutted public unions by holding that laws requiring union dues for public employees violate the First Amendment by compelling nonmembers to subsidize private speech on matters of substantial public concern.<sup>91</sup> In doing so, the Court overruled *Abood v. Detroit Board of Education*,<sup>92</sup> a precedent that had governed for over forty years.

*Abood* had held that, even though mandatory union dues for nonmembers inevitably infringe on First Amendment rights, that infringement was, at least in part, justified by the importance of the union to labor relations.<sup>93</sup> Nonmembers could be assessed fees to cover the costs of “collective bargaining, contract administration, and grievance adjustment,” but they may opt not to have their dues used “to contribute to political candidates and to express political views unrelated to [union] duties”.<sup>94</sup> Even for the permissible uses of nonmember fees, the *Abood* Court recognized significant First Amendment burdens:

To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests. An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. An employee might object to the union's wage policy because it violates guidelines designed to limit inflation, or might object to the union's seeking a clause in the collective-

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<sup>90</sup> See *supra* text accompanying notes 36–47.

<sup>91</sup> *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps.*, 138 S. Ct. 2448 (2018).

<sup>92</sup> *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), overruled by *Janus*, 138 S. Ct. at 2460.

<sup>93</sup> *Abood*, 431 U.S. at 222–23.

<sup>94</sup> *Id.* at 225–26, 234.

bargaining agreement proscribing racial discrimination. The examples could be multiplied. To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit.<sup>95</sup>

Nevertheless, the Court determined in *Abood* that "such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress."<sup>96</sup> Essentially, in balancing the First Amendment harms against the legitimate legislative interests, the state's interests came out on top.

However, in an opinion by Justice Alito, the Roberts Court reversed course in *Janus* and held that conduct that previously was *not* considered unconstitutional compelled speech is now a violation of the First Amendment.<sup>97</sup> In announcing the decision to overrule *Abood*, the Court stated that "there are very strong reasons in this case" to overturn precedent,<sup>98</sup> suggesting that "[f]undamental free speech rights are at stake."<sup>99</sup> Further, Justice Alito noted that *Abood* "is inconsistent with other First Amendment cases and has been undermined by more recent decisions."<sup>100</sup> And despite protest from dissenters,<sup>101</sup> the majority decided that "no reliance interests on the part of public-sector unions are sufficient to justify the perpetuation of the free speech violations that *Abood* has countenanced for the past 41 years."<sup>102</sup>

Some might wrongly argue that *Janus*'s logic should extend to voting regulations like AVR. In *Janus*, the Court struck down a state requirement that—per the Court's own prior analysis—had incidental effects on speech but otherwise served legitimate government ends.<sup>103</sup> Cast in this light, *Abood*'s analysis—finding that "important government interests . . . presumptively support the impingement" of First Amendment rights<sup>104</sup>—looks a lot like the *Anderson-Burdick* framework's application to "reasonable, nondiscriminatory restrictions" on voters' First Amendment

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<sup>95</sup> *Id.* at 222.

<sup>96</sup> *Id.*

<sup>97</sup> *Janus*, 138 S. Ct. at 2486.

<sup>98</sup> *Id.* at 2460.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> See *id.* at 2497 (Kagan, J., dissenting) (noting the "massive reliance interests at stake").

<sup>102</sup> *Id.* at 2460.

<sup>103</sup> See *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, 225 (1977).

<sup>104</sup> *Id.*

rights.<sup>105</sup> If the Roberts Court was willing to upend the balancing of First Amendment rights with important government interests in the union context, who is to say that they will not feel empowered to do the same in the voting-regulation arena?

Critics of AVR could claim that the justifications offered by Justice Alito in *Janus* should be applied in the voting-regulation context. In doing so, they would argue that “[f]undamental free speech rights are at stake”<sup>106</sup> in many voting regulations, like *Burdick*’s ban on write-in voting, and that the Court should hold that similar free speech rights are burdened by AVR.<sup>107</sup> Such arguments may be welcomed by the minority of Justices who feel that *Anderson-Burdick*, like *Abood*, “is inconsistent with other First Amendment cases,”<sup>108</sup> and who have made an effort to undermine its reasoning.<sup>109</sup> Further, since AVR is a relatively new policy, there are not strong reliance interests at stake, giving those same Justices an excuse to hold AVR unconstitutional. More broadly, following *Janus*, critics will argue that it does not matter if there are strong reliance interests in the *Anderson-Burdick* framework, as they would be insufficient “to justify the perpetuation of the free speech violations.”<sup>110</sup>

Fortunately, AVR should be spared from any such attempt to extend *Janus*’s reasoning. For one, the speech at issue is hardly comparable. In *Janus*, public union dues were held unconstitutional because they were used to support public sector bargaining which translated into a host of political views about how the state should spend public funds.<sup>111</sup> Whether that speech was the type that the “government can regulate . . . in its capacity as an employer” was up for debate,<sup>112</sup> but the speech clearly expressed a political

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<sup>105</sup> *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)) (“[W]hen a state election law provision imposes only ‘reasonable, nondiscriminatory restrictions’ upon the First and Fourteenth Amendment rights of voters, ‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions.”).

<sup>106</sup> *Janus*, 138 S. Ct. at 2460.

<sup>107</sup> See *supra* Part II.

<sup>108</sup> *Janus*, 138 S. Ct. at 2460.

<sup>109</sup> See, e.g., *Buckley v. Am. Const. L. Found., Inc.*, 525 U.S. 182, 207 (1999) (Thomas, J., concurring) (arguing that, notwithstanding *Anderson-Burdick*, “[w]hen a State’s election law directly regulates core political speech, we have always subjected the challenged restriction to strict scrutiny”); *id.* at 208 (“I suspect that when regulations of core political speech are at issue it makes little difference whether we determine burden first because restrictions on core political speech so plainly impose a ‘severe burden.’”).

<sup>110</sup> *Janus*, 138 S. Ct. at 2460.

<sup>111</sup> See *id.* at 2474–77.

<sup>112</sup> *Id.* at 2487 (Kagan, J., dissenting).

view.<sup>113</sup> The same cannot be said for registering to vote which, at most, expresses the fact of registration.<sup>114</sup>

More broadly, the Court has continually recognized and affirmed the need to show deference to reasonable regulation of elections, even when applying heightened scrutiny. Even when the Court purports to apply pure First Amendment scrutiny to election laws burdening core political speech—like in *Doe v. Reed*, in which the Court upheld a law permitting the disclosure of petition signers’ names<sup>115</sup>—it nevertheless applies something arguably less than strict scrutiny, often called exacting scrutiny, and appears to engage in a similar balancing of sorts.<sup>116</sup> The *Doe* Court cited *Burdick* when explaining the need to “allow States significant flexibility in implementing their own voting systems.”<sup>117</sup>

From a practical perspective, disposing of the *Anderson-Burdick* framework and applying strict scrutiny to all laws that incidentally burden First Amendment rights would spell disaster for election administration; nearly all voting regulations impact speech in some capacity.<sup>118</sup> It is critical for a functional democracy that the Court permit states to “control the mechanics of the electoral process” through regulations like AVR, even when there may be minor incidental burdens on speech.<sup>119</sup>

### C. NIFLA and Limiting Lesser Scrutiny

Another recent case raises concerns that the Court is narrowing the categories within compelled speech where it would have previously applied

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<sup>113</sup> Even *Abood* found that “[t]o compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests.” 431 U.S. at 222.

<sup>114</sup> See *supra* note 42.

<sup>115</sup> *Doe v. Reed*, 561 U.S. 186, 196, 202 (2010).

<sup>116</sup> *Id.* at 196 (applying “exacting scrutiny”); see *id.* at 232 (Thomas, J., dissenting) (suggesting that “strict scrutiny” should apply instead).

<sup>117</sup> *Id.* at 195–96 (citing *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992)).

<sup>118</sup> See *supra* text accompanying notes 63–68; see also *Burdick*, 504 U.S. at 433 (“[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently.”). This is not meant as a comprehensive defense of *Anderson-Burdick*; there are plenty of reasons to criticize the standard when it is used to allow states to infringe the right to vote under the guise of election regulation. See, e.g., Joshua A. Douglas, *A Tale of Two Election Law Standards*, AM. CONST. SOC’Y (Sept. 24, 2019), <https://www.acslaw.org/expertforum/a-tale-of-two-election-law-standards/> [<https://perma.cc/P6YT-46S3>] (“*Anderson-Burdick* balancing is itself flawed, and the courts must recognize the centrality of the right to vote to our democratic system and impose stringent rules on governments that try to infringe on that right.”).

<sup>119</sup> See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 345 (1995).

lesser scrutiny.<sup>120</sup> In *NIFLA v. Becerra*, the Court struck down a California law requiring licensed pregnancy-related clinics to disseminate a notice stating the existence of publicly-funded contraception and abortions, and requiring unlicensed pregnancy-related clinics to disseminate a notice stating that they were not licensed.<sup>121</sup> The case appeared to be governed by *Planned Parenthood of Southeastern Pennsylvania v. Casey*, in which the Court had evaluated the alleged First Amendment right of a physician “not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State.”<sup>122</sup> The *Casey* Court had stated that “[t]o be sure, the physician’s First Amendment rights not to speak are implicated, . . . but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.”<sup>123</sup> Thus, any compelled speech involved presented no constitutional issue.<sup>124</sup>

In *NIFLA*, Justice Thomas changed course, striking down the California law as impermissible compelled speech.<sup>125</sup> Justice Thomas argued that there are only two exceptions to the application of strict scrutiny for compelled professional speech: “laws that require professionals to disclose factual, noncontroversial information in their ‘commercial speech’”<sup>126</sup> and laws regulating professional conduct that “incidentally involve[] speech,” as in *Casey*.<sup>127</sup> The Court then avoided that latter category by arguing that the California law was “not tied to a procedure at all,” making it a regulation of speech rather than of professional conduct.<sup>128</sup> Here, unlike *Janus*, the Court avoided overruling precedent to broaden the use of strict scrutiny. Rather, it narrowed the categories that warrant lessened scrutiny in order to determine that the challenged law demanded stricter review.

Assuming the Court were to find that registering to vote is political speech, the Court could theoretically use the same maneuver to shift AVR out of the *Anderson-Burdick* framework and instead automatically apply strict scrutiny. For example, the Court could narrow *Burdick* by saying it

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<sup>120</sup> Technically, the *Janus* Court did not apply strict scrutiny; though the Court found that “exacting scrutiny” was enough to strike down the union fees requirement, the Court did not rule out the possibility that applying *strict scrutiny* would, in fact, be the correct standard. *Janus*, 138 S. Ct. at 2465.

<sup>121</sup> Nat’l Inst. of Fam. & Life Advoc. v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2375, 2378 (2018).

<sup>122</sup> 505 U.S. 833, 884 (1992).

<sup>123</sup> *Id.* (citing *Wooley v. Maynard*, 430 U.S. 705 (1977)).

<sup>124</sup> *Id.*

<sup>125</sup> Justice Thomas was joined by Chief Justice Roberts and Justices Kennedy, Alito, and Gorsuch. *NIFLA*, 138 S. Ct. at 2367.

<sup>126</sup> *Id.* at 2372 (quoting *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651 (1985)).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 2373–74.

only applies to election regulations involving “activity at the polls.”<sup>129</sup> Voter registration—setting aside the possibility of same-day voter registration—does not fall within the category of “activity at the polls.”

Fortunately for AVR, just days before *NIFLA* was decided, the Court strongly indicated that it would reinforce—rather than narrow—the application of lesser scrutiny to reasonable voting regulations that impinge on speech. In *Minnesota Voters Alliance v. Mansky (MVA)*, the Court struck down Minnesota’s broad ban on wearing political apparel in polling places.<sup>130</sup> However, even though the Court determined that the law was unconstitutional, it declined to apply strict scrutiny. Rather, the Court announced that “[a] polling place . . . qualifies as a nonpublic forum,” and, in doing so, the Court shifted the speech regulation into a lesser tier of scrutiny.<sup>131</sup> In a nonpublic forum, the government has “much more flexibility to craft rules limiting speech” provided that “the regulation on speech is reasonable” and viewpoint-based.<sup>132</sup> The Court displayed “a more realistic and functional understanding of the political process,” recognizing that regulation of the speech-filled work of elections is inevitable and necessary.<sup>133</sup>

This is not to say that we should expect the Roberts Court to analyze AVR as part of a nonpublic forum, but the nonpublic forum analysis, which defers to “reasonable” “regulation,”<sup>134</sup> resembles the lower end of the *Anderson-Burdick* framework. Thus, this decision signals general movement in the right direction for AVR, especially when the two regulations are compared: Political apparel is core political speech; registration has no inherent political message. *MVA*’s ban directly burdened speech; AVR regulates election mechanics with only incidental impacts on speech. If the Roberts Court is moving toward applying lesser scrutiny to polling-place restrictions on core political speech, we should not expect the same bench to shift AVR into a higher tier of scrutiny.

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<sup>129</sup> *Burdick v. Takushi*, 504 U.S. 428, 438 (1992).

<sup>130</sup> 138 S. Ct. 1876, 1885–92 (2018).

<sup>131</sup> *Id.* at 1886.

<sup>132</sup> *Id.* at 1885 (citation omitted).

<sup>133</sup> Richard L. Hasen, *The Supreme Court Made a Good Decision on Election Law*, SLATE (June 14, 2018, 12:31 PM), <https://slate.com/news-and-politics/2018/06/in-minnesota-voters-alliance-v-mansky-the-supreme-court-makes-a-good-decision-on-election-law.html> [https://perma.cc/ZG4H-KD3W] (“Even though the majority struck down Minnesota’s law, it did so in such a way that allows election officials great discretion to keep politicking out of the polling place and let people vote in peace.”).

<sup>134</sup> *MVA*, 138 S. Ct. at 1885.

## CONCLUSION

As troubling as it may be to see a top U.S. election official publicly laying the groundwork for a First Amendment challenge to AVR, it is more troubling still to wonder if the Court might actually rule in favor of such a claim. This Essay's application of long-standing precedent offers a strong defense of the view that registering to vote is not politically expressive conduct, and even if it were, AVR likely would receive lesser scrutiny. Nevertheless, decisions by the Roberts Court show a concerning trend toward expanding protections to subjectively expressive conduct and broadening the scope of compelled speech doctrine while narrowing safe harbors that warrant lesser scrutiny. Fortunately, it does not take much to see that the Court's burgeoning analysis is deeply mistaken. For now, there are strong defenses against extending each of these trends to AVR. Yet, the application of these cases' logic to a hypothetical AVR challenge should raise alarm bells. The possible implications extend far beyond voter registration; if extended too far, the Court's trends would subject nearly all voting regulations to strict scrutiny, if only because of incidental infringements on speech.